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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 258

ALBERT E. SCHWABACHER, ALBERT E. SCHWABACHER, JR., JAMES M. SCHWABACHER, ET AL.,
Appellants,

vs.

THE UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION OF CHESAPEAKE & OHIO RAILWAY COMPANY TO AFFIRM

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APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF VIRGINIA

MOTION OF CHESAPEAKE & OHIO RAILWAY COMPANY TO AFFIRM JUDGMENT

(Filed July 22nd, 1947)

(Title of Court and Style of Case Omitted)

1

Motion

The Chesapeake and Ohio Railway Company and Alleghany Corporation, pursuant to Rule 12, Paragraph 3, of the Rules of the Supreme Court of the United States,

move that the decree of the District Court be affirmed on the ground that the questions on which the decision of the cause depends have been settled by previous rulings of the Supreme Court and are now so unsubstantial as not to need further argument.

The Proceeding

This is a direct appeal from the final decree entered June 16, 1947, of a specially constituted District Court of three judges, established pursuant to the Urgent Deficiencies Act of October 22, 1913. The decree was entered in accordance with an opinion of June 12, 1947.[1] It dismissed appellants' complaint to set aside an order of the Interstate Commerce Commission.[2] Appeal was allowed on July 22, 1947, and on the same day appeal papers were served on the C. & O. and Alleghany.

The Commission's order of April 1, 1947,[3] was made in a proceeding under Section 5 of the Interstate Commerce Act as amended (49 U. S. C., Sec. 5) that had been instituted on March 8, 1946, by application of C. & O., Alleghany and Pere Marquette Railway Company for authority to merge Pere Marquette into C. & O. The order granted such authority. When appellants, as holders of Pere Marquette Preferred Stock, instituted their action in the District Court to set aside the order, the three companies intervened

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[1] Appended to the Jurisdictional Statement in this appeal.

[2] The order and related Report constitute Ex. 1-A to the Complaint.

[3] On petition for reconsideration by appellants, the effective date of the April 1 order was stayed by the Commission on May 2, 1947, until its further order (Ex. 1-B to Complaint). By an order of the full Commission dated May 29, 1947, the petition for reconsideration was denied and the April 1 order made effective 15 days thereafter (Ex. 1-C to the Complaint). A request of appellants for a further stay was denied by the Commission on May 28, 1947.

as of right[4] and moved that the complaint be dismissed as failing to state a claim upon which relief could be granted because the Commission's action was within its powers, was based on substantial evidence, was in accord with legal standards and was therefore conclusive. After oral argument on June 4, 1947, the United States and the Commission joined in that motion.

On the same day the District Court denied the stay and the case was submitted for final decision on the merits. In accordance with the program announced in oral argument, the two carriers then consummated the merger on June 6, 1947, by proceedings before the Secretary of State of Michigan and the State Corporation Commission of Virginia. As forecast by the decision of June 4, the District Court later handed down its opinion that the complaint was without merit and entered its order appealed from here granting the motion to dismiss.

Statement of the Case

The C. & O. is an interstate railroad between Chesapeake Bay on the east and Toledo and Chicago on the west. The Pere Marquette lines afford a natural northwestward extension from Toledo through Michigan. With Commission approval, the C. & O. has, since 1929, had stock control of Pere Marquette. The merger was an outgrowth of that relationship.

After consideration of extensive evidence on the consequences of the merger with respect to public service, the Commission found the merger "consistent with the public interest" under Section 5(2) and the related issuance of

[4] Judicial Code, Sec. 212-213 (28 U. S. C., Sec. 45a).

securities "compatible with the public interest" under Sec. 20a. This finding is not challenged by appellants.

Turning then to matters of private right in the exercise of its responsibility under Section 5(2) to see that the terms and conditions were "just and reasonable", the Commission considered extensive evidence on that subject. It did so, indeed, with special care in view of C. & O.'s controlling interest in Pere Marquette, for that was deemed to "compel close scrutiny" of the allotments of new securities in the Merger Agreement. In this task the Commission considered all the stipulated terms of the Pere Marquette Preferred Stock, including its dissolution preference and the large amount of accumulated dividends, finding, however, that:

> ". . . the prospects of Pere Marquette stockholders for returns on their investments would be enhanced by merger of their comany into the Chesapeake & Ohio."

The Commission then reviewed the situation of both roads from the point of view of a wide range of investment factors in the light of which these legal terms were to be appraised in determining fair treatment. The nature of this evidence and the conclusion reached are, for present purposes, sufficiently epitomized in the ultimate finding, which likewise is unchallenged:

> "Accordingly, considering the Pere Marquette's investment according to its books, other property values, the company's history as to earnings, its future prospects, and the market appraisal of its stocks, all as set forth above, we find that, as to the stockholders of both parties generally, the proposed ratios of exchange, stock issues, and assumptions of indebtedness are just and reasonable."

Appellants had intervened before the Commission as owners of Pere Marquette Preferred Stock who had not

voted for the merger. Even there, they did not oppose the merger itself. Their main argument was only that the Commission was under a legal duty to provide some special and more favorable treatment for them because they were dissenting from the merger.[5] While this relief was indicated in exploratory rather than explicit terms, their desire was evidently for payment in cash at the rate of par plus accumulated dividends, in all about $175 per share. That claim is now made in terms in the Jurisdictional Statement (Sec. D).

This is in contrast to the treatment which the Commission found "just and reasonable" for all holders of Pere Marquette Preferred (8/10 of a share of C. & O. Preferred Stock and 4/10 of a share of C. & O. Common Stock for each share of Pere Marquette Preferred), treatment which had been accepted by 59% of all outstanding shares of Pere Marquette Preferred and 71% of all voted shares of Pere Marquette Preferred. The Merger Agreement provides this treatment for all holders of Pere Marquette Preferred, whether or not assenting to the merger (Article VII).

In addition the Merger Agreement provides machinery for those wishing to dissent (Article IX). It may be noticed that a proceeding[6] is now pending in the Chancery Court of the City of Richmond, Virginia, the State where C. & O. was incorporated, in which all dissenters may obtain payment in cash of the "fair cash value" of their stock as of the day before the meeting of Pere Marquette stock-

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[5] This is not a matter of assentors losing their rights by consent, for the Commission must still protect all the Preferred Stock that was not voted either way (17% of the total, only a small part of which was later dissented). The Commission's finding related to all shares of Preferred Stock, whether assenting, dissenting or silent, so the contention is that appellants got something special by dissenting.

[6] *The Chesapeake and Ohio Railway Company* v. *Hylas N. Hastings, et al.*, instituted June 6, 1947.

holders, by appraisal under Virginia law[7] if applicable and otherwise by similar proceedings in equity if appropriate claim therefor shall have been made by August 11, 1947. There is no statutory provision in Michigan, the State where Pere Marquette was incorporated, for appraisal of dissenting stock in railroads, though consolidations of railroads are permitted by Michigan statute in force since before the incorporation of Pere Marquette (Michigan Statutes Annotated, Sec.'s 22.233-4). The Michigan statute requires, however, that a merger agreement be sanctioned by a majority vote of each class of voting stock and further requires that it be approved by the Interstate Commerce Commission. Section 5 of the Interstate Commerce Act makes no provision for appraising the stock of dissenting stockholders but imposes on the Commission the duty to determine that the merger is in the public interest and the terms are "just and reasonable."

The Commission considered appellants' contention in the light of the whole record. The Commission was apprehensive that State laws permitting money judgments for dissenting stockholders upon appraisal or other proceedings might obstruct the accomplishment of Federal policy for unifications, for in its view it was

> "difficult to conceive of a restraint or limitation on contemplated unifications better serving to frustrate the national transportation policy than provisions of State laws for compensation of dissenting stockholders on specified bases."

The Commission nevertheless refrained from any effort to preclude proceedings of that kind in local courts. On the other hand, it was unwilling to enlarge any appraisal rights otherwise existing under State law. In fact, it left those rights as they were under local law, for en-

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[7] Virginia Code of 1919, as amended, Sec. 3822-a.

forcement in such manner, and with such results, as local law might provide. The measure of its duty, it concluded, was Federal law as proclaimed in Section 5(2). Under that provision, it was the Commission's duty to see that the terms are "just and reasonable", that is, to see that the allotments of new securities represent the fair equivalent of the old in all the circumstances. But it need go no further. So, having found, after "close scrutiny", that the terms and conditions are "just and reasonable", it said:

> ". . . performance of our duty in respect to stockholders is complete, in our opinion, when we make certain that all stockholders of the same class are to be treated alike."

The Commission was thus vigilant to prevent any discrimination against non-assenting minorities, and insisted that the treatment it deemed "just and reasonable" should be available for all members of the class, as in fact the Merger Agreement proposed. But it did not think that members of that class could, for purpose of Federal law, remove themselves to a special class or entitle themselves to special treatment by the mere fact of dissenting. If any such claim could be asserted under State law, it concluded, it was to be enforced in State tribunals alone, saying:

> Whether *dissenting* stockholders, as members of a *class* created by the merger, are entitled to better treatment under their charter contract with the Pere Marquette is a question not within our province to decide, *Otis & Co.* v. *Pennsylvania R. Co.*, 61 Fed. Supp. 905" (Italics added).

In summary, it was the clear view of the Commission that all holders of Pere Marquette Preferred Stock were a single class for purposes of Federal law and the treatment

accorded them must be "just and reasonable," and further that, if any dissenting stockholders as such should constitute a separate class within the meaning of any State law, any rights accorded them in that capacity by State law might still be enforced in State tribunals but could be enforced only there.

The District Court approved this view. It said:

> "Reduced to its lowest terms, the case of the plaintiffs here seems to be based on the theory that dissenting stockholders (quite apart from any merit in the grounds of dissent) are entitled to preferential treatment, more favorable than the treatment accorded to stockholders of the same class (holding the same securities) who did not dissent but agreed to the conditions in the merger agreement; and, as a consequence, if the Commission does not grant such preferential treatment to the dissenting stockholders, a three-judge district court is justified in setting aside or modifying the order of the Commission. We know of no case sustaining this (to us) novel principle. We think, further, this theory has no support in practical economics or in commercial ethics.
>
> "As we read the opinion of the Commission, it did not attempt to pass upon what rights, if any, dissenting stockholders might have under the laws of the several states. It specifically left Pere Marquette and Chesapeake and Ohio 'free to settle controversies with dissenting stockholders through negotiation and litigation in the courts.' We adopt a like course. Nothing in our opinion is to be interpreted as in any way determining, affecting or prejudicing these rights, whatever they may be."

Appellants repeat the same contention here. As made clear in the Jurisdictional Statement (sec. D., second paragraph), it is that appellants, by their mere act of dissenting from the merger, entitled themselves to receive an amount in cash or its equivalent equal to the par value of

their stock plus accumulated dividends thereon because the Pere Marquette charter prescribes that amount as the preferential claim of the Preferred Stock "In the event of any liquidation, dissolution or winding up, whether voluntary or involuntary. . . . ." Appellants accordingly say that the Commission was required as a matter of law to condition its approval of the merger on payment of such a sum to them.

4

The Question

Since appellants did not offer in evidence before the District Court the record made before the Commission, they are precluded from attacking the Commission's findings, which must be accepted as true.[3]

It follows that the only question presented in this appeal is whether the act of dissent from a railroad merger requires the Commission as a matter of law to give the dissenting stockholder different treatment from the rest of his class, either *(i)* by awarding cash in a given amount instead of a "just and reasonable" award of new securities, or *(ii)* by awarding cash or its immediate equivalent in the full amount of the stipulated dissolution preference though admittedly exceeding "just and reasonable" treatment.

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Argument

Both elements of this question have been settled by previous rulings of this Court and merit no further consideration.

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[3] *Louisiana & P. R. R.* v. *U. S.*, 257 U. S. 114, 116 (1921); *Mississippi Valley Barge Line Company* v. *U. S.*, 292 U. S. 282, 286 (1934).

(a) The Question of Cash

No holder of old securities, even of bonds or debentures, has an unconditional right under Federal law to payment in cash upon a readjustment of interests in the enterprise except where the quality of his right in all the facts as appraised by the administrative agency makes that necessary for fair and equitable treatment. It is within the power of the administrative agency to satisfy all his old rights by a "fair and equitable" award of new securities, even of stock, both in case of insolvent companies under the Bankruptcy Act (*Group of Institutional Investors* v. *Chicago, Milwaukee, St. Paul & Pacific R.*, 318 U. S. 523, 563-4, 1943) and in case of solvent companies under the Public Utility Holding Company Act (*In Re Standard Gas and Electric Co.*, 151 F. 2d 326, 329, C. C. A. 3, 1945, *cert. den.*, 327 U. S. 796, 1946). *A fortiori* it is within the power of the Commission to satisfy the rights of old shares of *stock* by a "just and reasonable" award of new stock. The premise that the particular award of new securities in this case is "just and reasonable", unassailable here as pointed out above, precludes any right to require the Commission to provide payment in cash.

The only other circumstance in appellants' claim is that they dissented from the merger. But their state of mind is not a pertinent circumstance in appraising the Commission's legal duty. The controlling test, for purposes of "just and reasonable" treatment, was the worth of their old security in all the circumstances. Neither the attributes of their old securities, nor their resulting rights, could be enlarged by taking thought, whether for the merger or in opposition to it. This follows *a fortiori* from the holding in *R.F.C.* v. *Denver and Rio Grande Western R.*, 328 U. S. 495, 535 (1946), where it was held, though under a provision

of the Bankruptcy Act contemplating a vote by security holders, that:

> "If a plan gives fair and equitable treatment to dissenters, the elements which make the plan fair and equitable cannot be the basis for a reasonably justified rejection."

In a word, dissent from a merger does not in itself establish dissenters as a separate class and they have no additional rights because of their individual wishes. This is, indeed, a longstanding principle:

> ". . . the classification should in nowise depend upon the nature of the claimant or his interest in the sense of his bias or leanings, but only upon the nature of the claim." (*J. P. Morgan & Co.* v. *Missouri Pacific R.*, 85 F. 2d 351, 352, C. C. A. 8, 1936, *cert. den.*, 299 U. S. 604, 1937, arising under Section 77 of the Bankruptcy Act.)

Any other rule would, as the Commission recognized, gravely obstruct the accomplishment of the Federal policy for unification of interstate railroads on "just and reasonable" terms.[9]

Had the Commission purported to preclude the assertion of any right to cash payment under State law, an arguable question might have been presented. But the Commission left any such rights available to appellants by appropriate proceedings under State law. The Commission clearly had no duty to enforce State law itself, and no Federal law re-

[9] All previous Commission decisions cited in the Jurisdictional Statement (footnote 9) deal with purchases of a controlling stock interest where the Commission was solicitous to require an offer on the same terms to minority holders, fearing the possibilities of oppression by the new controlling interest. The only policy those decisions make for is equality of opportunity. That policy is realized in full here, for the Merger Agreement assured identical opportunities to all.

quires it to abdicate the exercise of its administrative judgment and abstain from "just and reasonable" treatment for the sole purpose of awarding cash to those who prefer to have it.

The assertion that the Commission was governed by any legal duty to make such an award, or to prescribe means for making it, presents no arguable question.

(*b*) *The Question of Dissolution Preference*

A stipulated dissolution preference is, like any other attribute of a security, one of the factors to be considered in determining fair treatment. But it is no more. Even where a dissolution in fact occurs under State law, a Federal administrative agency empowered to devise a "fair and equitable" plan is not, by that circumstance alone, under a legal duty to award the full amount of the stipulated dissolution preference (*Otis & Co.* v. *S. E. C.*, 323 U. S. 624, 1945). *A fortiori* this is true where no dissolution in fact occurs under State law. There was none here:

> "Whether a merger results in the dissolution of th constituent corporations depends upon the terms and intent of the statute involved. . . .
>
> "It is well settled in this State that the merger of two corporations does not end the existence of either. . . ." (*Adams* v. *U. S. Distributing Corp.*, 184 Va. 134, 150, 34 S. E. 2d 244, 251, 1945, *cert. den.*, 327 U. S. 788, 1946)
>
> . . . . . .
>
> "Those who become stockholders in a private corporation become such upon the agreement and contract that their investment therein may be handled subject to the exercise of any and all powers conferred upon the corporation by law." (*Voigt* v. *Remick*, 260 Mich. 198, 244 N. W. 446, 449, 1932, *cert. den.*, 289 U. S. 756, 1933, referring to the power to consolidate.)

In the alternative, taking the question whether the charter provision for a dissolution preference applies under Section 5 of the Interstate Commerce Act to be a matter of Federal law, like the applicability of similar provisions under the Public Utility Holding Company Act (*Otis & Co.* v. *S. E. C.*, at p. 636), it is equally settled that there was no dissolution here:

> ". . . merger . . . would avoid . . . liquidation" (*id.*, at p. 631 and v. pp. 637-8).

In either event, accordingly, the assertion that the Commission was under an unconditional legal duty to award the full amount of the stipulated dissolution preference presents no arguable question.

Conclusion

We ask, therefore, that the judgment of the District Court be affirmed.

Dated July 31, 1947.

Respectfully submitted,

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